IN THE

Supreme Court of the United States

October Term, 1978

No. 78-822

JOSEPH WILCZYNSKI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court Appellate Division, First Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

On June 9, 1977, petitioner Joseph Wilczynski was convicted in the Supreme Court, New York County (Kassal, J.), after a jury trial, of GRAND LARCENY IN THE THIRD DEGREE (New York Penal Law, section 155.30[1]) and OFFICIAL MISCONDUCT (New York Penal Law, section 195.00). On September 6, 1977, petitioner was sentenced to a term of nine-months imprisonment on each charge,

the terms to run concurrently. By an order entered October 12, 1978, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment against petitioner without opinion. On November 1, 1978, leave to appeal to the New York Court of Appeals was denied. Petitioner is presently incarcerated pursuant to the judgment against him.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division, First Department, entered on October 12, 1978.

Constitutional and Statutory Provisions Involved

1. The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. * * *

2. The fourteenth amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty or property, without due process of law. * * *

3. New York Penal Law, section 20.00 provides:

> When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

4. New York Criminal Procedure Law, section 200.70 (2) provides in pertinent part:

> An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it * * *.

Statement of the Case

The evidence at trial established that on November 20, 1975, petitioner, a New York City police officer, entered and searched the apartment of Aida Velasquez with three of his fellow officers, Anthony Manisera, Matthew Smith and Frank Farrelly. Petitioner stole approximately $300 to $400 in cash which he recovered during the search. He distributed the proceeds amongst himself, Manisera and Smith. Officer Smith removed a bag containing $15,000 from the apartment. This money represented the proceeds from the sale of heroin which Velasquez's boyfrier transacted in the apartment. Smith vouchered only $355 of this money, as well as guns and drugs which were also recovered during the search, and kept the rest of the money for himself.

In an indictment filed on July 14, 1976, petitioner was charged with grand larceny in the second and third degrees and official misconduct.* At the conclusion of petitioner's trial, the court instructed the jury with respect to the principles of criminal liability for the conduct of another, pursuant to New York Penal Law, section 20.00. Defense counsel objected to this instruction on the ground

* Anthony Manisera and Matthew Smith were separately indicted and convicted.

that petitioner had not been indicted under that theory of liability. Counsel requested that the court inspect the grand jury minutes to determine if the grand jury had considered that theory. The court denied the request.

On June 9, 1977, the jury found petitioner guilty of grand larceny in the third degree and official misconduct; he was acquitted of grand larceny in the second degree.

On appeal to the Appellate Division of the New York Supreme Court, petitioner argued that by instructing the jury on accessorial liability, the court changed the theory of the indictment which had charged defendant with the direct commission of the crimes. This, petitioner argued, constituted an improper amendment of the indictment in violation of New York Criminal Procedure Law, section 200.70(2) as well as petitioner's constitutional rights. Although not specifying what constitutional rights were thereby violated, petitioner relied on *Ex parte Bain*, 121 U.S. 1, 10 (1886) in which this Court held that an amendment of an indictment without resubmission to the grand jury is violative of the fifth amendment provision mandating indictment by a grand jury. The Appellate Division rejected these contentions without opinion. Petitioner's application for leave to appeal to the Court of Appeals was subsequently denied.

ARGUMENT

No substantial question is presented by petitioner's claim that the court's charge on accessorial liability constituted an amendment of the indictment which violated petitioner's fifth and fourteenth amendment rights.

Petitioner claims that by instructing the jury on accessorial liability pursuant to New York Penal Law, section 20.00, the trial court amended the indictment which had charged defendant with the direct commission of the crimes. This, petitioner argues, deprived him of due process and of his right to be indicted by a grand jury.

Petitioner's constitutional claims are wholly insubstantial and do not merit review by this Court.

Petitioner's claim of deprivation of his right to be indicted by a grand jury is groundless since it is long settled that the due process clause of the fourteenth amendment does not require an indictment by a grand jury in a State prosecution. *Hurtado* v. *California*, 110 U.S. 516 (1884). *See Alexander* v. *Louisiana*, 405 U.S. 625, 633 (1972). Even if that right were held applicable to the States, petitioner's claim under that provision as well as his due process claim would nevertheless fail since the court's charge on accessorial liability did not constitute an amendment to the indictment. Accessorial conduct is not a distinct crime or an element of a crime, as petitioner claims; it is merely a theory of liability. One cannot be convicted of accessorial conduct, but only of the underlying crime which he aids another to commit. Thus, it is well established in New

York that an indictment need not charge a defendant with aiding and abetting in the commission of a crime in order to permit proof of such conduct at trial as the basis of defendant's liability. *People* v. *Katz,* 209 N.Y. 311, 325-26 (1913); *People* v. *Valerio,* 64 A.D.2d 516 (1st Dep't 1978). Similarly, it has been uniformly held in the federal courts of appeal that section 2 of title 18, United States Code, the comparable federal statute, is embodied in every indictment as an alternative theory of liability, should the prosecutor opt to prove his case by that theory. *E.g., United States* v. *McCambridge,* 551 F.2d 865, 871 (1st Cir. 1977); *United States* v. *Maselli,* 534 F.2d 1197, 1200 (6th Cir. 1976); *United States* v. *Pellegrino,* 470 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied,* 411 U.S. 918 (1973); *Levine* v. *United States,* 430 F.2d 641, 643 (7th Cir. 1970), *cert. denied,* 401 U.S. 949 (1971).

This Court has on more than one occasion upheld convictions on the theory of aiding and abetting where that theory was submitted to the jury but was not set forth in the indictment. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618-20 (1949); *Pereira* v. *United States,* 374 U.S. 1, 9-11 (1954); *see Jin Fuey Moy* v. *United States,* 254 U.S. 189, 192 (1920). Thus, the question raised by petitioner is wholly insubstantial, having been foreclosed by prior decisions of this Court. *Palmer Oil Corp.* v. *Amerada Corp.,* 343 U.S. 390 (1952).

Notably, petitioner does not now claim, nor did he claim on appeal, that he was unfairly surprised by proof that he acted in concert with others or by the court's charge in accord with that proof, such that he could not properly defend against the charges. Indeed, prior to the commencement of the pre-trial identification hearing in this case, the prosecutor stated on the record that he intended to elicit proof at trial that defendant had acted in concert with others (Record at 52-54).* Clearly, petitioner cannot claim that he was denied due process.

In urging this Court to exercise its discretion and review his claim, petitioner points to an alleged conflict in decisions between the First and Second Judicial Departments of the Appellate Division of the New York Supreme Court. Clearly the New York Court of Appeals is the more appropriate forum to resolve such a conflict, if such a conflict were found to exist. In fact, the Second Department decision relied on by petitioner, *People* v. *Boyd,* 59 A.D.2d 558, 560 (2d Dep't 1977) is not in conflict with the decision in the First Department in the instant case. In *Boyd,* the court below had deleted the aiding and abetting provision of the indictment. The Second Department held that the deletion constituted an improper amendment of the indictment. However, the holding in *Boyd,* that surplusage once pleaded is binding, is not the same as the requirement that such surplusage must be pleaded in the first instance. While an indictment need not charge a defendant with aiding and abetting in order to support proof of such conduct at trial, once the grand jury charged that theory, the court was without power to amend the indictment. Thus, the two decisions are easily reconciled.

In sum, petitioner has put forth no basis for this Court to review his claim. His claim of constitutional deprivation

* The record, which was not included with the petition, can be made available at the Court's request.

does not merit consideration since he fails to allege how he was prejudiced by the court's instructions. Moreover, the question he raises has been uniformly settled in the federal and New York courts. Since petitioner points to no controversy calling for resolution by this Court, the petition should be denied.

Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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